

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
 C.P. No. S- 83 of 2023

Date	Order with signature of Judge
1.	For hearing of CMA No. 627 of 2023
2.	<u>For hearing of main case</u>
Date of Hearing	: 10 May 2023 and 29 June 2023
Petitioner	: <u>Umar Jamshed</u> through <u>Mr. Yahya Iqbal, Advocate</u>
Respondent No. 1:	: <u>Mishal Javaid</u> through <u>Ms. Zahra Sehr Viyani Advocate</u>
Respondent No. 2	: Nemo

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
 C.P. No. S- 94 of 2023

Date	Order with signature of Judge
1.	For hearing of CMA No. 759 of 2023
2.	<u>For hearing of main case</u>
Date of Hearing	: 10 May 2023 and 29 June 2023
Petitioner	: <u>Mishal Javaid</u> through <u>Ms. Zahra Sehr Viyani</u>
Respondent No. 1:	: <u>Umar Jamshed</u> through <u>Mr. Yahya Iqbal, Advocate</u>
Respondent No. 2	: Nemo

ORDER

MOHAMMAD ABDUR RAHMAN J. These two Petitions have each been maintained under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 by each of the Petitioners as against a Judgement and Decree both of which are dated 13 December 2022 that was passed by the VIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 and which modified a Judgement and Decree dated 30 July 2022 passed by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020.

2. Mishal Jawaid and Umar Jamshed were married to each other on 29 December 2015. A Minor "B" was born on 21 May 2018 and who is currently aged 5 years. Both Mishal Jawaid and Umar Jamshed come from well settled families and are both educated. Regrettably, the happiness in their marriage was short-lived. Mishal Jawaid alleges that on account of Umar Jamshed's behaviour to her, which according to her included both physical and emotional abuse being inflicted to her by him, she left the matrimonial home on two occasions and thereafter on 29 October 2019 left the matrimonial permanently along with the Minor "B". Umar Jamshed controverts this position and primarily contends that Mishal Jawaid was the solely responsible, on account of her behaviour, for the breakdown of the marriage.

3. Mishal Jawaid leaving the matrimonial home, resulted in Umar Jamshed maintaining a suit for Restitution of Conjugal Rights bearing Family Suit No. 1403 of 2020. This was disposed of on 9 February 2020. Thereafter a very typical situation had occurred, Mishal Jawaid maintained Family Suit No. 1739 of 2020 for maintenance. Thereafter Guardian and Wards Application No. 1366 of 2019 was maintained by Umar Jamshed seeking custody of the Minor "B". Guardian and Wards Application No. 1366 of 2019 has apparently been disposed of on 26 May 2021 and against which two appeals bearing G & W Appeal No. 116 of 2021 and G & W Appeal No. 117 of 2021 were preferred and which were disposed of on 5 November 2021. Umar Jamshed has maintained Constitution Petition No. 889 of 2021 as against that order before this Court and which was disposed off by this court on 1 December 2022. Mishal Jawaid has thereafter also maintained Guardians and Wards Application No. 2498 of 2022 seeking to be declared as the Guardian of the Minor "B" and which is still pending. During this period, Mishal Jawaid and Umar Jamshed have divorced with effect from 12 June 2021.

4. The dispute in these proceedings revolves around Family Suit No. 1739 of 2020 which was instituted by Mishal Jawaid and in which she had sought:

- (i) the return of her dowry articles and other belongings in “perfect condition” or if such items and belongings were not found to be in “perfect condition” then the market value of those items along with a 10% “mark up” on such amounts until the realisation of those amounts; and
- (ii) payments of Maintenance, from Umar Jamshed for the upkeep of the Minor “B” under various heads.

The pleadings in Family Suit No. 1739 of 2020 contain various allegations of both Umar Jamshed and Mishal Jawaid as against the other. Umar Jamshed forwards a picture that Mishal Jawaid is completely unreasonable in her behaviour, and besides his best efforts to resolve whatever disputes had occurred as between them, she consistently rejected his attempts to overcome such issues. He further contends that he at all times has supported both Mishal Jawaid and Minor “B” to the best of his abilities. Conversely, Mishal Jawaid alleges that the breakdown of the marriage was on account of the unstable behaviour of Umar Jamshed. Both of them attempt to rely on various correspondence, photographs and other documents to discredit the others personalities as well as the personalities of their parents.

5. Family Suit No. 1739 of 2020 was heard by the Family Judge Karachi South who, after recording evidence, on 20 July 2022 passed a Judgement and Decree in the following terms:

- (i) That the Dowry Articles that belonged to Mishal Jawaid should be returned by Umar Jamshed to her in the presence of the Bailiff;
- (ii) Maintenance Payments of Rs. 70,000 per month from January 2020 till the end of Mishal Jawaid's idaat period should be paid to her by Umar Jamshed;
- (iii) Umar Jamshed was liable to pay Mishal Jawaid a sum of Rs. 100,000 per month for the maintenance of the Minor "B" representing past maintenance and in addition to pay school fees and admission fees at actuals;
- (iv) Umar Jamshed was liable to pay Mishal Jawaid a sum of Rs. 50,000 per month for the maintenance of the Minor "B" representing past maintenance and in addition to pay school fees directly to the school on actuals; with an annual increment of 15% per annum and school fees at actuals.

6. Umar Jamshed maintained Family Appeal No. 155 of 2022 before the VIIth Additional District Judge (MCAC) Karachi (South) as against Judgement and Decree dated 30 July 2022 passed by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 seeking to reduce the amount of maintenance payable by him to a sum of Rs. 5,000 per month for the upkeep of the Minor "B". Mishal Jawaid did not file any appeal and during the pendency of Family Appeal No. 155 of 2022 before the VIIth Additional District Judge (MCAC) Karachi (South) supported the Judgement and Decree dated 20 July 2022 passed in Family Suit No. 1739 of 2020 by the Family Judge Karachi South. By her Judgement dated 12 December 2022 the VIIth Additional District Judge (MCAC) Karachi (South) was pleased to allow Family Appeal No. 155 of 2022 and directed that:

- (i) Umar Jamshed was liable to pay Mishal Jawaid a sum of Rs. 50,000 per month from February 2020 till the end of the period of her idaat;
- (ii) Umar Jamshed was liable to pay Mishal Jawaid a sum of Rs. 50,000 per month for the maintenance of the Minor "B" representing past maintenance and in addition to pay school fees and admission fees on actuals;
- (iii) Umar Jamshed was liable to pay Mishal Jawaid a sum of Rs. 50,000 per month for the maintenance of the Minor "B" representing past maintenance and in addition to pay school fees directly to the school on actuals; with an annual increment of 10% per annum and school fees on actuals.

7. Both Umar Jamshed and Mishal Jawaid have impugned the Judgement dated 12 December 2022 passed by the VIIth Additional District Judge (MCAC) Karachi (South) in Family Appeal No. 155 of 2022 by instituting CP No. S-83 of 2023 and CP No. S-94 of 2023 respectively. Umar Jamshed seeks a further downward revision in the maintenance payments while Mishal Jawaid seeks an upward revision in the maintenance payments to be paid for the maintenance of the Minor.

8. Mr. Yahya Iqbal who appeared on behalf of Umar Jamshed has contended that the criteria for assessing how much maintenance was liable to be paid was based on the following factors:

- (i) Social status of the Parties;
- (ii) Age of the Minor;
- (iii) Reasonable expenses required;

- (iv) Sources of Earnings;
- (v) Income of the father; and
- (vi) the Wife's earning capacity.

To support his contentions, he relied on a decision of the Supreme Court of Pakistan reported as **Humayun Hassan vs. Arslan Humayun**¹ wherein it was held that:

“ ... 4. There can be no cavil with the proposition that the maintenance issue(s), in relation to Muslim relatives shall be governed and regulated by the principles/injunctions of Islam i.e. as per the personal law of the parties. In this context, according to section 369 of the Muhammadan Law by D.F. Mullah, maintenance means and includes food, raiment and lodging. However, it may be observed that from the very language of the above section, such definition is neither conclusive nor exhaustive, and in our view it undoubtedly has a wider connotation and should be given an extended meaning, for the purposes of meeting and catering for the present days social, physical, mental growth, upbringing and well being of the minor, keeping in mind the status of the family, the norms of the society and his educational requirement, which has now attained utmost importance; but obviously corresponding to and commensurating with the means and the capacity of the father to pay. Anyhow, the same jurist in section 370 of the book has elucidated the liability of the father to pay the maintenance to his children as follows:-

“370. Maintenance of children and grandchildren.---(1) A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (section 352) does not relieve the father from the obligation of maintaining them. But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(2) If the father is poor, and is capable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.”

Again in interpreting the word “maintenance” some reasonable standard must be adopted. Whilst it is not confined merely to food, clothing and lodging, it cannot, by any stretch of imagination, be extended to incorporate within it education at higher levels ad infinitum. What is necessary to decide in this connection is to find out as to what amount of education has to be attained by the child concerned, having regard to the status and other circumstances of his family, to enable it to earn a complete livelihood by honest and decent means. Thus it may not be sufficient to say that the child of a tradesman can maintain itself by working as coolly or by thieving. What is required is that the child must be maintained until it is in a position to earn its own livelihood, in an honest and decent manner in keeping with its family status.”

¹ PLD 2013 SC 557

The decision of the Supreme Court of Pakistan clarifies both what constitutes maintenance and on whom the obligation to make such payments for maintenance is placed. He also relied on a decision of the Delhi High Court entitled **Amit Sharma vs. Shellka Sharma and others** 2022 SC Online Del 1661 to explain what factors are to be taken into account for a court while determining payment of maintenance for a minor. He finally relied on an unreported decision of the Lahore High Court, Lahore WP No.154537 of 2018 entitled **Nazia Bibi etc. vs. Additional District Judge, Ferozewala etc.** in which while relying on the decision reported as **Humayun Hassan vs. Arslan Humayun**² context was given to what constitutes maintenance and on whom the obligation to make such payments for maintenance is placed. Mr. Yahya Iqbal contended that the amount that has been awarded by the VIIth Additional District Judge (MCAC) Karachi (South) in Family Appeal No. 155 of 2022 is grossly excessive as compared to the needs of the Minor "B" as well when compared to the income of the Umar Jamshed. He contends that Mishal Javaid has in her cross examination conceded that Umar Jamshed earns a sum of Rs. 50,000 per month and he could not therefore be obligated to pay his entire monthly income as maintenance to the Minor "B".

9. Ms. Zahra Sehr Viyani appeared on behalf of Mishal Javaid and contended that the downward revision of the maintenance payments made by the VIIth Additional District Judge (MCAC) Karachi (South) in Family Appeal No. 155 of 2022 was completely unjustified on the basis of the evidence adduced. She contended that it was apparent that Umar Jamshed was clearly suppressing his income so as to create pressure on Mishal Javaid so as to grant him additional rights of access to meet the Minor "B" which are currently being regulated by various court orders. While supporting the Judgement and Decree dated 30 July 2022 passed by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020, she

² PLD 2013 SC 557

submitted that as against the criteria that has been set by the Supreme Court of Pakistan if any revision needed to be made an upward revision of the maintenance payments was warranted.

10. I have heard both the Counsel for Umar Jamshed and Mishal Javaid and have perused the record.

11. The jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to examine decisions of the Family Court has recently been clarified by the Supreme Court of Pakistan in the decision reported as **Arif Fareed vs. Bibi Sara**³ where the Supreme Court of Pakistan, while refusing leave to appeal, held that:

“ ... 6. In the instant case, the petitioner was required to show some jurisdictional defect committed by the courts below but he failed to do so and, therefore, his writ petition was dismissed. Now he has come for grant of leave against the order passed by the High Court. Learned counsel for the petitioner was required to make out a case for grant of leave by showing some defect in the judgment of the High Court but he failed. In this view of the matter, learned counsel failed to make out a case for the grant of leave.

7. Before parting with this judgment, we may reiterate that the right of appeal is the creation of the statute. It is so settled that it hardly needs any authority. The Family Courts Act, 1964 does not provide the right of second appeal to any party to the proceedings. The legislature intended to place a full stop on the family litigation after it was decided by the appellate court. However, we regretfully observe that the High Courts routinely exercise their extraordinary jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 as a substitute of appeal or revision and more often the purpose of the statute i.e., expeditious disposal of the cases is compromised and defied. No doubt, there may be certain cases where the intervention could be justified but a great number falls outside this exception. Therefore, it would be high time that the High Courts prioritise the disposal of family cases by constituting special family benches for this purpose. Accordingly, leave to appeal is refused and petition stands dismissed.”

As is apparent, the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is limited primarily to rectify jurisdictional defects that are committed by the Family Court or the Appellate Court in adjudicating a *lis*. Jurisdictional defects that could be looked into were highlighted by the Supreme Court of Pakistan in the

³ 2023 SCMR 413

decision reported as **Mollah Ejahar Ali vs. Government of East Pakistan and others**⁴ wherein it was held that:

“ ... To deal with the second contention first, there is no doubt that the High Court’s order which is unfortunately perfunctory gives the impression of a hasty off-hand decision which, although found to be correct in its result, is most deficient in its content. If a summary order of rejection can be made in such terms, there is no reason why a similar order of acceptance, saying “there is considerable substance in the petition which is accepted” should not be equally blessed. This will reduce the whole judicial process to authoritarian decrees without the need for logic and reasoning which have always been the traditional pillars of judicial pronouncements investing them with their primary excellence of propriety and judicial balance. Litigants who bring their dispute to the law Courts with the incidental hardships and expenses involved do expect a patient and a judicious treatment of their cases and their determination by proper orders. **A judicial order must be a speaking order manifesting by itself that the Court has applied its mind to the resolution of the issues involved for their proper adjudication.** The ultimate result may be reached by a laborious effort, but if the final order does not bear an imprint of that effort and on the contrary discloses arbitrariness of thought and action, the feeling with the painful results, that just has neither been done nor seems to have been done is inescapable. When the order of a lower Court contains no reasons, the appellate court is deprived of the benefit of the views of the lower Court and is unable to appreciate the process by which the decision has been reached.”

(Emphasis is added)

12. I have reviewed both the Judgement and Decree each dated 13 December 2022 that was passed by the VIIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 and the Judgement and Decree dated 30 July 2022 passed by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020. It is apparent that a great deal of time was spent by the Family Court and the Appellate Court in attempting to ascertain the income that was earned by Umar Jamshed. In this regard, I do acknowledge that the challenge before the Family Court in our Society is formidable. A very large portion of people in our country are undocumented and tracing funds of such persons to determine their income and hence their liability for payment of maintenance can be quite a challenge. In this regard, the efforts of the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 in summoning the income tax returns of a private limited company owned by the family of Umar Jamshed should be acknowledged. Keeping in mind that Section 17 of the Family Courts Act,

⁴ PLD 1970 Sc 173

1964, sans section 10 and 11, excludes the application of the Code of Civil Procedure, 1908 and also excludes the application of the provisions of the Qanun e Shahdat Order, 1984 the Supreme Court of Pakistan has clearly expressed its opinion on the powers of the family court in the decision reported as **Farzana Rasool and 3 others vs. Dr. Muhammad Bashir and others**⁵ wherein it was held that:

“ ... *In presence of the Code, need was felt to have a forum for resolution of family disputes, wherein instead of cumbersome procedure, a short and simple methodology shall be provided for settlement and disposal of disputes relating to family matters. It was, therefore, that the Act was promulgated, which is a special Act for special cases in respect of special disputes between a special class of people i.e. husband and wife and children in case of their maintenance and custody.*

The object was to have expeditious disposal of such matters in shortest possible time. The provisions of the Code and the Evidence Act were made inapplicable on the strength of section 17 of the Act. It is well known that under the Code, there is lengthy procedure for trial with so many bottlenecks, where civil disputes linger on between the parties for decades at the trial stage. Similarly, strict adherence to the rules of the Evidence Act, if followed, would also create so many hindrances in recording of the evidence and technical bars as to the admissibility and relevance of the evidence. It is, therefore, that even the provisions of the Evidence Act were made inapplicable to avoid technicalities.

So, if the provisions of the Code and the Evidence Act were made applicable, it would have frustrated the very object of the Act, which requires the Special Court shall be constituted and such Court shall have exclusive jurisdiction in respect of the matrimonial disputes. The object of the Act is to shorten the agony of litigant parties and to provide them justice as early as could be possible. Matters pertaining to the Family Court be of dissolution of marriage, restitution of conjugal rights, entitlement of a child or children or of wife to the maintenance, payment of dower, all such issues are required to be decided in speedy manner, because no such issue can be left undecided for decades; because a minor, seeking maintenance, may become major by the time his case is decided by the Family Court or a wife, seeking dissolution of marriage, may go out of marriageable age by the time she get decided her suit for dissolution of marriage.”

Similarly, in the decision reported as **Lt. Col. Nasir Malik vs. Additional District Judge, Lahore**⁶ it was held that:

“ ... 6. *As far as the contention of the learned counsel for the petitioner that enhancement in maintenance allowance cannot be sought through an application under section 151, C.P.C. but through a separate suit is concerned, suffice it to say that the provisions of C.P.C. are not stricto sensu applicable to the proceedings under West Pakistan Family Courts Act, 1964, as such the Family Court was competent **to adopt its own procedure**, therefore, the objection raised by the learned counsel is misconceived. The legislature has established the Family Courts for expeditious settlement and disposal of the disputes relating to marriage and family affairs and the matters connected therewith.”*

⁵ 2011 SCMR 1361

⁶ 2016 SCMR 1821

More recently in the decision reported as **Muhammad Arshad Anjum vs. Mst. Khurshid Begum**⁷ the Supreme Court of Pakistan has opined that:

“ ... 4. Petitioner's recourse to defend his title in the disputed land, decreed in respondent's favour as her dower, before the Family Court and latter before the Additional District Judge, though somewhat haphazard, nonetheless, was the only option available to him. The Family Court decreed the suit, without a full dress trial merely upon failure of respondent's husband to take special oath, a circumstance that too prevailed with the learned Appellate Court. Ostensible contest remained restricted between the spouses without slightest breach in the nuptial bond, to the exclusion of rest of the world. Failure of petitioner's Constitution petition in the High Court also turned out a far cry. Throughout the contest, respondent relied upon technical barricades, thus, the questions that call for our consideration are whether exclusion of the provisions of the Code of Civil Procedure, 1908 barring sections 10 and 11 thereof, stood in impediment to petitioner's approach to the Family Court for re-examination of the judgment within the contemplation of section 12(2) of the Code or that he should have asserted his claim of being a bona fide purchaser with consideration through an intervener in civil plenary jurisdiction?

*The Family Court Act 1964 (W.P. Act XXXV of 1964) (the Act) was enacted for "expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith"; provisions of the Qanun-e-Shahadat Order, 1984 (P.O. No.10 of 1984) and those of the Code except sections 10 and 11 have been excluded to achieve the legislative intent. The exclusion of normal rules of procedure and proof, applicable in civil plenary jurisdiction for adjudication of disputes in proceedings before a Family Court, is essentially designed to circumvent delays in disposal of sustenance claims by the vulnerable; this does not derogate its status as a Court nor takes away its inherent jurisdiction to protect its orders and decrees from the taints of fraud and misrepresentation as such powers must vest in every tribunal to ensure that stream of justice runs pure and clean; such intendment is important yet for another reason, as at times, adjudications by a Family Court may involve decisions with far reaching implications/consequences for a spouse or a sibling and, thus, there must exist a mechanism to recall or rectify outcome of any sinister or oblique manipulation, **therefore, we find no clog on the authority of a Family Court to re-examine its earlier decision with a view to secure the ends of justice and prevent abuse of its jurisdiction and for the said purpose, in the absence of any express prohibition in the Act, it can borrow the procedure from available avenues, chartered by law.***

(Emphasis is added)

A Family Court having the requisite jurisdiction to “adopt its own procedure” and also having the jurisdiction to “borrow the procedure from available avenues” and there being no express prohibition in the statute preventing the Family Court to call for such evidence, I am clear that the jurisdiction exercised by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 in calling for evidence such as bank statements and income tax returns, in circumstances where such evidence is not readily adduced by

⁷ 2021 SCMR 1145

the party themselves, was proper. Needless to say, the same power is equally exercisable by the Family Court when confronted with inflated maintenance claims on behalf of a Minor.

13. While, what is to constitute the various heads under which maintenance is to be paid has been settled by the Supreme Court of Pakistan in the decision reported as *Humayun Hassan vs. Arslan Humayun*,⁸ and in which it has been held that such heads must be considered on a case-by-case basis, clearly certain essential heads of maintenance such as education and medical expenses would be consistently found to payable in nearly all cases and which to my mind should, unless good reason can be shown why they shouldn't, be paid on an actual's basis. I note that this course of action has been partially adopted in both the Judgement and Decree each dated 13 December 2022 that was passed by the VIIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 and the Judgement and Decree dated 30 July 2022 passed by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 wherein it was directed that educational expenses should be paid on an actual's basis. I can see no reason why both the Courts should have omitted to make similar directions regarding medical expenses and would stress that being an essential expense the should always be paid on an actuals basis, unless a good reason is shown as to why it should not. The remaining heads of maintenance, have of course to be determined by the Family Court against the criteria as decided by the Supreme Court of Pakistan. Ideally, at the pre-trial stage, a Family Court should attempt to develop a consensus as to the various heads of maintenance, other than the heads of educational and medical expenses, that both the parties would agree should be included under the heads of maintenance. Finally, for heads against which there is no consensus, the Family Court should include such heads of maintenance if it considers that it would be something the

⁸ PLD 2013 SC 557

Minor would need, as per the decision of the Supreme Court of Pakistan in **Humayun Hassan vs. Arslan Humayun**,⁹ to allow the Minor to get into a position “to earn its own livelihood, in an honest and decent manner in keeping with its family status.” If one is to consider the Judgement and Decree each dated 13 December 2022 that was passed by the VIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 the Appellate Court has held that:

“ ... In support of her claim; the respondent No. 2 drew a table of expenses in the plaint and in affidavit in evidence which includes education; food; maid, pampers. etc. It is pertinent to note here that the minor is about 04 years of age and it cannot be believed that the minor in this age uses pampers. Similarly the employment of maid for a child can hardly be termed as maintenance as it amounts to luxuries instead of necessities. If the respondent no. 2 so desire or can afford she may employ servants for the child but the fathers obligation to maintain his child is only to the extent of necessitates of the minor and his financial condition.”

It is noted that while various heads of maintenance have been rejected by the Court no speaking order has been passed whereby reasons are given for either including or excluding a head of maintenance and instead certain heads of maintenance have been rejected stating that such amounts are not payable by a father as he is only obliged to maintain a Minor “to the extent of necessities of the minor and his financial condition.” This is in contrast to the standard adopted by the Supreme Court of Pakistan which has been clarified to be to maintain a minor to allow the Minor to be put in a position “to earn its own livelihood, in an honest and decent manner in keeping with its family status.” While clearly providing “necessities” will permit a Minor to be put in a position to “earn its own livelihood, in an honest and decent manner” I cannot agree that only providing “necessities” would in all cases be sufficient to permit a Minor to be put in a position to “earn its own livelihood, in an honest and decent manner in keeping with its family status”. Clearly the obligation of the Father, as clarified by the Supreme Court of Pakistan is greater than that and the criteria adopted by the Appellate Court in this regard is flawed. It was incumbent on the Appellate

⁹ PLD 2013 SC 557

Court to consider every head of maintenance that was advanced by Mishal Javaid and to pass a speaking order as to why each of those heads of expense should or should not be used as a basis to determine the maintenance that is to be paid by to the Minor "B." Indeed, the Judgement and Decree dated 30 July 2022 passed by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 also fails to make a judicial determination in such terms and to my mind such a course of action as taken by both the Courts falls short of what is required to pass an order "manifesting by itself that the Court has applied its mind to the resolution of the issues involved for their proper adjudication."

14. The next issue that requires consideration is the quantum of the maintenance awarded. The Family Court had after considering the evidence had held that:

" ... *In view of the above discussion, facts and reasons...*

Plaintiff No. 1 is entitled for the maintenance of plaintiff No. 2 from the defendant and past maintenance of the plaintiff No 2 is allowed at the rate of 1,00,000/- per month as well as monthly school and admission fee from January 2020 till the interim order passed by this Court in Application under Section 17 A. Plaintiff is also entitled for the future maintenance of Plaintiff No. 1 from the defendant at the rate of Rs, 1,00,000/- and education expenses / school fee, tuition fee and admission fee with 15% increment per annum till the legal entitlement of plaintiff No. 2."

The basis for making such a finding is as below:

" ... *I have gone through the evidence and facts, circumstances anof the present case, it reveals that defendant himself deposed on Oath that all expenses of minor as well as foreign tour, personal expenses honeymoon tour, medical payments, fee of marriage counsellor/consultant and all other expenses has borne by Plastipack company and his parents. It is clear and crystal on face of record that defendant parents/family is very strong financially and after death of his father defendant is one of the shareholder in his father property as inherent share as per the Sharia so he is also considered as financially strong person and he is able to afford all minor reasonable expenses and give him a good social status as he enjoy himself. It is admitted by the both parties that defendant paid 300,000 /- to the plaintiff after separation for 3 month, except such amount not a single penny has given which could show from evidence. Defendant counsel suggested the question to the plaintiff that defendant send money through money order but nothing is placed on record which shows that defendant sent any maintenance through bank account or money order for maintenance. Consequently, I am of the view that plaintiff No. 1 is entitled for the maintenance from the defendant at the rate of Rs. 70,000/- per month from January 2020 till her idaat period. As far as maintenance of the plaintiff No. 2 is concerned, plaintiff No.*

/minor is also entitled for the past maintenance from the defendant for daily life necessities including lodging, bred and butter, clothing, tuition, extra curricular activities and others at the rate of Rs 1,00,000/- per month and all monthly school and admission fee from January 2020 till the interim order passed by this Court in application under Section 17 A. Plaintiff No. 1 is also entitled for the future maintenance of plaintiff No. 2 from the defendant at the rate of Rs. 1,00,000/- and education expenses/fees including school fee, tuition fee and admission fee with 15% increment"

Contrastingly the VIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 after identifying some inconsistencies in the evidence of Umar Jamshed regarding his income and the payments that were actually made by him has held that:

" ... *It is the own showing of the appellant that he had sent Rs. 300,000/- as maintenance fir the respondent No. 2 and respondent No. 3/minor for three months; in such circumstance; the amount of maintenance is reduced to Rs. 50,000/each for respondent No. 2 and respondent No.3/minor.*

In the light of above discission, the respondent nO. 2 is entitled to obtain maintenance @ Rs. 50,000/- since February 2020 till idaat period and respondent no. 3/minor is entitled for past maintenance @ Rs. 50,000/- per month as well as monthly school and admission fee from February,2020 till the interim order. The respondent No. 3/minor is entitled for future maintenance @ Rs. 50,000/- till legal entitlement with 10% increase pers anum; in addition to school which is deposited in school directly."

While I have no cavil with the maintenance payments that were awarded by the VIIth Additional District Judge Karachi (South) to Mishal Javaid as they have not been assailed by her, I consider that the finding of the VIIth Additional District Judge Karachi (South) and of the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 as to determining the quantum of maintenance without determining what would be the financial needs of the Minor "B" to be incorrect. While clear evidence has been given by Mishal Javaid as to the expenses of maintaining the Minor "B", there is no finding by the Court as to what the financial needs of the Minor "B" actually are. To my mind whenever a finding is to be given as to what maintenance payments are to be made in favour of a Minor **it is mandatory for a Court to first adjudicate as to what are the different heads of expenses are that would constitute the financial maintenance requirements of the**

Minor as against the criteria set by the Supreme Court of Pakistan in Humayun Hassan vs. Arslan Humayun,¹⁰ and thereafter to quantify such amounts. Once the amounts are quantified the final step for the court would be then to attribute the obligation of that payment to the parties. To do otherwise would in affect be to arbitrarily decide on a figure which would in no manner be proportionate to the financial requirements of the Minor. As is apparent, this was actually neither done by VIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 or by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020. The VIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 reducing the amount by half on the basis that a maintenance payment of Rs. 300,000 was made by Umar Jamshed to Mishal Javaid for herself and for the Minor "B". would justify such a downward revision is to my mind completely arbitrary. The very logic of such a payment is not based on the financial requirements for the maintenance of the Minor as identified by the Supreme Court of Pakistan in the decision reported as **Humayun Hassan vs. Arslan Humayun**¹¹ but rather seems to be based on an estoppel by the conduct of Mishal Javaid in accepting such an amount. This is clearly incorrect. Firstly, the principles of the Qaunun e Shahdat Order, 1984 have specifically been excluded in the application to proceedings under the Family Courts Act, 1964 by the provisions of Section 17 of the Family Courts Act, 1964 and which include, but are not limited to, Article 114 of the Qanun e Shahdat Order, 1984 and therefore there was no basis to apply the principles of estoppel to reduce such an amount. Secondly, the criteria for determining the payment of maintenance as clarified by the Supreme Court of Pakistan in the decision reported as **Humayun Hassan vs. Arslan Humayun**¹² has also been ignored. The findings by both the VIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 and the Family Judge Karachi (South) in Family

¹⁰ PLD 2013 SC 557

¹¹ PLD 2013 SC 557

¹² PLD 2013 SC 557

Suit No. 1739 of 2020, for the reasons stated hereinabove, are clearly not sustainable.

15. The final issue that needs to be addressed is in respect of the attribution of the responsibility for payment of maintenance to a Minor. This issue has also been addressed by the Supreme Court of Pakistan in the decision reported as **Humayun Hassan vs. Arslan Humayun**¹³ wherein it was held that:

“ ... 4. There can be no cavil with the proposition that the maintenance issue(s), in relation to Muslim relatives shall be governed and regulated by the principles/injunctions of Islam i.e. as per the personal law of the parties. In this context, according to section 369 of the Muhammadan Law by D.F. Mullah, maintenance means and includes food, raiment and lodging. However, it may be observed that from the very language of the above section, such definition is neither conclusive nor exhaustive, and in our view it undoubtedly has a wider connotation and should be given an extended meaning, for the purposes of meeting and catering for the present days social, physical, mental growth, upbringing and well being of the minor, keeping in mind the status of the family, the norms of the society and his educational requirement, which has now attained utmost importance; but obviously corresponding to and commensurating with the means and the capacity of the father to pay. Anyhow, the same jurist in section 370 of the book has elucidated the liability of the father to pay the maintenance to his children as follows:-

“370. Maintenance of children and grandchildren.---(1) A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (section 352) does not relieve the father from the obligation of maintaining them. But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(2) If the father is poor, and is not capable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.”

The Supreme Court of Pakistan having clearly identified the obligations of both the Father and the Mother for payment of maintenance against the criteria of each of their means, clearly it would be incumbent on the Family Court to examine not only the fathers financial ability to pay **but in the event**

¹³ PLD 2013 SC 557

that the father financial ability is found to be wanting to also examine the mothers financial ability. In the event that the mother financial ability **is also found to be wanting** then it would be incumbent to make the Minor's grandfather also party to the proceedings so as to see whether he had the financial ability to maintain the Minor and if found able thereafter to attribute the obligation to him.

16. While both the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 and the VIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 had come to the conclusion that Umar Jamshed had the requisite financial capacity to maintain the Minor "B" no analysis was done by either of those courts as to what the expenses of the Minor B would actually amount to and thereafter to attribute the obligation to pay on that basis. As an example, if the court would come to the conclusion that the financial requirements of a Minor was Rs. 70,000 and the financial ability of the Father was only Rs. 30,000 it would be incumbent on the court to pass an order directing that liability for maintenance in excess of Rs. 30,000 would rest on either the wife or the grandfather depending on each of their financial capability. It cannot be that simply because a Court comes to a conclusion that the father lacks the requisite financial ability that the entire quantum of maintenance payment to a Minor should be reduced. To my mind the responsibility of the Family Court is, after carrying out a proper investigation into the approximate financial requirement of the Minor, to thereafter attribute the obligation for such payments as between the various persons responsible.

17. While considering the entire matter, it would be hard not to comment on one of the issues that would affect the entire superstructure of the issue of maintenance and which is as to who would be responsible for making decisions regarding the needs of a Minor to all the Minor to be put into a position to "*earn its own livelihood, in an honest and decent manner in*

keeping with its family status.” The scope of activities involved in achieving this goal is vast and challenging. While some of the activities would of course be consistent in all Minors e.g. education, sports, health, it is apparent that all such activities cannot be listed and would necessarily be subjective to each Minor. While I would assume that every parent would have the Minors best interests at heart so as to allow their child the fullest opportunities to succeed, such a desire is at all times restricted by the opportunity that life affords the Minor and the financial capacity of a parent to deliver once such an opportunity arises. Clearly once such an opportunity arises, such a decision and the financial consequences for it vest with the Guardian of the Minor and who under the Islamic Law of Sharia is the father. The presumption, not in law, but in human nature, would be that the Guardian would at all times be making decisions for the Minor keeping the Minors interests paramount and not attempting to deprive the Minor of an opportunity solely on the ground that his financial obligation to pay would increase. Needless to say, in the event that the Mother is of the opinion that the Father is putting his interests over the interest of the Minor by attempting to reduce his obligation to pay; the correct course of action would not be to raise this issue in proceedings for maintenance but rather to have make an application under Section 19 of the Guardians and Wards Act, 1890 to have the father declared as “unfit” to be a Guardian. Needless to say, such a declaration would not have any impact on his obligation to maintain the Minor which would be entirely independent of his status as a Guardian.

18. For the foregoing reasons I am of the opinion that there are jurisdiction errors that have been made in Judgement and Decree each dated 13 December 2022 that was passed by the VIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 and the Judgement and Decree dated 30 July 2022 passed by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 in as much as both the

courts have failed to passing a speaking order to **properly adjudicate on the issues** raised in the Family Suit No. 1739 of 2020. Both the Judgement and Decree each dated 13 December 2022 that was passed by the VIIth Additional District Judge Karachi (South) in Family Appeal No. 155 of 2022 and the Judgement and Decree dated 30 July 2022 passed by the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 are therefore set aside and the matter is remanded to the Family Judge Karachi (South) in Family Suit No. 1739 of 2020 to determine the maintenance payable for Minor “B” with the following directions:

- (i) the Family Court should first determine which heads of maintenance are to be considered in determining the quantum of the maintenance and should pass a speaking order either accepting or rejecting a head of maintenance that has been put forward for consideration by either Umar Jamshed or Mishal Javaid against the criteria established by the Supreme Court of Pakistan in **Humayun Hassan vs. Arslan Humayun**¹⁴ i.e. to allow the Minor to be put in a position to “*earn its own livelihood, in an honest and decent manner in keeping with its family status;*”
- (ii) after determining the heads of maintenance to quantify each head of maintenance on the basis of the evidence before it, and if such evidence is not readily available to adopt any procedure not specifically prohibited by the Family Courts Act, 1965 to quantify each head of maintenance;
- (iii) to assess the financial ability of Umar Jamshed to see whether the income earned by him would permit him to pay such maintenance and in the event that it is considered otherwise

¹⁴ PLD 2013 SC 557

to consider the financial capacity of Mishal Javaid to pay such an amount and to attribute the obligation to pay such amount accordingly;

Each of the Petitions, along with all listed applications, are disposed of in the above terms with no order as to costs.

JUDGE

Karachi dated 31 August 2023